IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants
Petitioners,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, KERN TRADING AND OIL COMPANY and T. S. MINOT,
Appellees,
Respondents.

No. 2028
In Equity

REPLY BRIEF OF RESPONDENTS

Opposing Application for Certification of Question of Law to Supreme Court

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The petitioners ask this Court to submit another question to the Supreme Court, under authority of Section 239 of the Judicial Code, after this Court has already submitted a number of questions and received the answers of the Supreme Court. Section 239 of the Judicial Code says that these answers

"shall be binding upon the Circuit Court of Appeals." This means that the answers already given must be taken as the law of this case.

This Court is now urged to say to the Supreme Court, "Did you not make a mistake in your interpretation of the Act of July 27, 1866"? In other words, this Court is asked to petition the Supreme Court for a rehearing after the applicants now before this Court have let the time for such a petition expire.

Mr. Hinkley's brief, in support of this petition, is very long. It is not necessary to follow it in detail. It is made up of reiterated statements of the single proposition that the Act of July 27, 1866, *excluded* mineral lands from its operation and that therefore the functions of the land department of the government were legally paralyzed whenever it was attempted to issue a patent to the railroad company of land actually mineral in character, whether known or not. He argues at great length that this railroad grant was special and peculiar in this respect, and not to be compared with general homestead or desert land acts. He asserts that the Supreme Court "inadvertently" overlooked this special and exclusive character of the grant.

Mr. Hinkley is not asking this Court to submit an additional question to meet a point not answered by the Supreme Court. His contention is that that Court was *wrong* in every answer it made, except

when it said that petroleum is a mineral. (See pages 3 to 8 of his brief.) By this he necessarily admits that the Supreme Court squarely met his present contention and decided it adversely to him in six of its seven answers. There has, therefore, been no failure to pass on the contention raised by Mr. Hinkley.

Nor was the Supreme Court unconscious that it was rejecting this contention. Mr. Hinkley filed a brief in the Supreme Court in this case, 127 pages long, of which 117 pages were devoted to the discussion of the very points he raises in his present brief. He also made an oral argument in that Court devoted almost wholly to the same contentions. This Court, in its certification of the second question, called particular attention to the fact that the grant *excluded* mineral lands. The same suggestion was contained in other briefs, and there is no doubt that the Supreme Court was well advised as to the necessity of considering and determining the contention now raised by Mr. Hinkley.

The official report of the decision of that Court appears in 234 U. S., at page 669. Pages 683 to 692 are devoted to the discussion of the contention that mineral lands are excluded from the operation of the grant. Mr. Hinkley's argument is there squarely met and disposed of. The Court knew what it was doing and was not at all inadvertent in its rejection of Mr. Hinkley's theory. It is therefore apparent that this Court is really being asked

to tell the Supreme Court that its decision is *wrong*. If this Court should certify the question Mr. Hinkley presents, the only answer the Supreme Court could make would be to point to Section 239 of the Judicial Code, which says that the answers already given are binding on this Court.

Mr. Hinkley's argument is verbal rather than substantial. Even though mineral lands are *excluded* from the operation of the Act, other lands are not. Some one must decide what lands are properly patentable. Section 4 of the grant throws this duty on the officers of the land department. Mr. Hinkley admits that they may patent lands that are non-mineral. Necessarily they must decide which lands fall within that category. His theory is that they have power to reach a decision which is right, but not one which is wrong. If they have jurisdiction to enter upon the inquiry and to reach a decision, they must also have the *power* to reach a wrong decision. The only way this result can be avoided, as a practical matter, is to deny them the power to enter upon the inquiry at all. This would result in no patents whatever being issued under the railroad grant.

The fallacy in Mr. Hinkley's contention is shown in his attempted explanation of the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S. 288. He claims that that case is an "absolute authority" in his favor, yet explains elaborately that his present contention was not considered in that case, because

the mineral claimants did not need to raise it, and the railroad company was afraid to do so. Therefore, it seems according to his brief, the Supreme Court contented itself with holding that title to hidden minerals did not pass at the date of definite location but would pass only at the date of the patent. He explains this latter proposition on the ground that there was in that case a contest between mineral claimants and the railroad company. This, he says, gave the land department jurisdiction to pass on the mineral character of the land *under the mining laws*, not under the railroad grant. Apparently, therefore, a patent to the railroad company of land actually mineral would be good when there was a mineral contest, but not otherwise.

This is a refinement we are not able to follow. Whether there was a mineral contest or not, the patent would issue to the railroad company under the operations of the railroad grant. Therefore the holding in the Barden case that such a patent would pass the title to the railroad company cannot be explained or distinguished in the manner suggested by Mr. Hinkley. The Supreme Court itself has made the proper application of the Barden case in its decision of the present case.

In this decision, the Supreme Court has said that there is no essential distinction between railroad and other grants *(p. 692)*. It is now argued that our grant is peculiar because it provides that mineral lands "are excluded from the operations of

this Act." This means no more than do words granting lands "not mineral." Both in fact grant only lands that are not mineral. Both *exclude* mineral lands from their operation, one by the express use of the word, and the other by strict limitation to non-mineral lands. Both are however, subject to the lawful administrative power of the land department to determine what lands are to be patented as coming within the description in each grant.

The words just referred to are no more restrictive than similar expressions found in many other grants, all of which have been commonly interpreted as giving the land department power to determine what lands shall pass. For instance, in the grant of July 2, 1862, to the several states for agricultural colleges, it was provided "that no mineral lands shall be selected or purchased under the provisions of this Act." *(2 Lester, 59.)* Since that time, several other grants have been made for the same purpose, and it has been held that the land department had power to determine whether the selected lands were mineral or not.

Buena Vista Petroleum Co. vs. Tulare Oil & Mining Co., 67 Fed. 226;
Southern Development Co. vs. Endersen 200 Fed., 272.

Many other similar restrictions in general and special grants might be cited, under which it has been held that the land department has jurisdiction

to decide whether land is mineral or not. Reference will be made to only one of these, however, as it is the most striking. The Townsite Act *(Rev. Stats, Sec. 2392)* provides "that no title shall be acquired under the provisions of this Act to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."

This restriction is far more emphatic than the exclusion clause we are considering. Mr. Hinkley recognizes this and argues at length that the words just quoted absolutely exclude known mines from passing under a townsite patent. In support of this he cites *Davis vs. Weibbold*, 139 U. S., 507. In that case there was issued both a townsite patent and later a mineral patent. The Court does not say that the townsite patent passed no title to the land covered by the later mineral patent. It did say, at page 528 of the opinion that if the introduction in evidence of the mineral patent had been objected to, a very serious question would have arisen as to whether the land department had not lost jurisdiction by the issuance of a townsite patent. As the issues were framed, it was not necessary for the Court to determine this point. But in the later case of *Moran vs. Horsky*, 178 U. S., 205, it was held that a townsite patent passed the title to even a known mining claim within the limits described in the patent, leaving to the claim owner merely an equity which might be waived by his laches. This decision was put on the ground that as the land covered by the mining claim was "apparently within

the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable and not void." *(Page 212.)*

It must be obvious that when the Supreme Court held in the present case that the officers of the land department had the power to inquire and decide whether land sought by the railroad company under its grant was mineral or not, it was following an established line of predecents. It interpreted the grant in the light of its entire scope, and not as is now sought to be done by confining attention to a few expressions found within that grant.

The decision of the Supreme Court was well considered and is right. In no sense can it be said to have been inadvertent. The labored attempt made by Mr. Hinkley to attach some importance to the omission of the word "as" before the word "aforesaid," in the fourth section of the grant of 1866, as it is quoted by the Supreme Court, may be dismissed from consideration, since the official report of the decision shows no such omission.

There is, therefore, no occasion for this Court to submit a further question, as such a question would necessarily involve a refusal to accept the answers already given.

December 2, 1914.

Respectfully submitted,

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